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In the Supreme Court of the United States

October Term, 1940

No. 233

JAMES B. BERRY SONS' COMPANY, Inc.,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, Lessee of Michigan Central Railroad,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Notice of the filing of petition for writ of certiorari was served on counsel for respondent on July 15, 1940.

FINAL JUDGMENT

Final judgment was entered for respondent on May 8, 1940 by the Court of Common Pleas of Venango County, Pennsylvania for $9,569.08 with interest from November 2, 1932, the judgment for petitioner in the trial court having been reversed on appeal and the record remitted by the Supreme Court of Pennsylvania on May 7, 1940.

JURISDICTION OF THE COURT

This case involves the liability of a consignor who ships carload freight in interstate commerce by rail. The subject has been considered by this court and many state courts on numerous occasions. Title 49 U. S. C. A. Sec. 3, par. (2) Notes 2 and 3. The Supreme Court of Pennsylvania in reversing the judgment of the trial court stated and applied the principles announced in the decisions of this court (R. 351-356). The repetitious reasons for writ of certiorari, as set forth in petitioner's brief (pp. 6-7), are essentially the same, and present no federal question not foreclosed by prior decisions. The contention concerning credit is unsubstantial in character and devoid of merit. Under such circumstances, the petition should be denied. *Deming v. Carlisle Packing Co.*, (1912) 226 U. S. 102.

ARGUMENT

The petitioner shipped thirty carloads of oil by rail from points of origin in Texas, through the United States, to a destination in Ontario, Canada. The shipments moved under the uniform straight bill of lading prescribed by the Interstate Commerce Commission. The consignee became bankrupt before charges were paid. Suit was thereupon brought by delivering carrier to recover transportation charges from consignor.

Petitioner was permitted at the trial to advance to the jury, over objection of respondent, various confused theories of estoppel, negligence, election, and alleged violation of Commission regulations, as a defense to the action. The entire question of liability was submitted to the jury by the trial court. A verdict was returned for the petitioner, and judgment was entered thereon. On appeal to the Supreme Court of Pennsylvania, petitioner relied principally on alleged claims of failure of proof. These claims were decided adversely to the petitioner. The Supreme Court of Pennsylvania stated and applied the principles announced by this Court in *Louisville & Nashville Rr. Co. vs. Central Iron and Coal Co.*, (1924) 265 U. S. 59, and corrected the error of the jury and trial court (R. 353-356).

Petitioner here contends that the carrier is estopped from collecting charges because the consignee failed to pay within 48 to 96 hours after delivery, such being the time limited for consignees to pay charges in the United States by order of the In-

terstate Commerce Commission in *Ex Parte 73*, 51 I. C. C. 591, as modified 171 I. C. C. 268. Respondent asserted throughout the trial that this matter was immaterial. In discussing petitioner's claim the Supreme Court of Pennsylvania pointed out that "there is evidence that the regulations concerning delivery on credit in Canada differ from those in effect on this side of the boundary." (R. 356). This testimony, incidentally, was elicited by petitioner on the cross-examination of respondent's witnesses. (R. 131a, 134a). Thereafter petitioner endeavored at length to exclude it from the record. (R. 202a-204a).

The claim that *Ex Parte 73* applies to deliveries in Canada is predicated on a fallacious premise that the Interstate Commerce Commission may regulate the way in which common carriers should do business in Canada. The Commission has no power to do so. Title 49 U. S. C. A. Sec. 1 (2).

An extension of credit, even if made in the United States contrary to the Commission regulations, would not release a consignor who has assumed a primary liability for charges under its shipping contracts. *Western Maryland Ry. Co. v. Cross* (1924) 96 W. Va. 666, 123 S. E. 572. If it is assumed that *Ex Parte 73* is a part of the shipping contract, no agreement could then be made between carrier and consignee in derogation thereof. *Davis v. Henderson* (1924) 266 U. S. 92. Inasmuch as the credit regulations are designed in the public interest to secure the prompt payment of charges, the result for which petitioner here contends would not only defeat the very purpose of the regulations, but also open the door for granting preferences to consignors. It is well established that a carrier cannot by a departure from tariff provi-

sions, either intentionally or unintentionally, estop itself from collecting from a person who has assumed a legal liability for charges. *Pittsburgh, C. C. & St. L. Ry. Co. v. Fink* (1919) 250 U. S. 577, 583. The deliveries here, of course, were made in Canada under Canadian regulations.

In this case the state court has decided the question of liability in accordance with the decisions of this court. No grounds are stated for granting a writ of certiorari.

Respondent respectfully submits that the petition should be denied.

Respectfully submitted,
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